Petition

Office - Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1981

ANDREW FRANKLIN WILSON

Petitioner

Vs.

BARBARA S. WILSON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR
THE FIFTH CIRCUIT

JACK N. ROGERS
604 St. Ferdinand Street
Baton Rouge, Louisiana 70802
(504) 344-4369

Counsel for Petitioner

ORTLIEB PRESS BATON ROUGE

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that the doctrine of "Res judicata" applies to this case.

2. Whether the doctrine of "Res Judicata" should be overridden in this instance to avoid a manifest injustice and because of overriding public policy.

3. Whether the United States Courts are invariably bound to the principle of "Res judicata" despite contravening public policy.

4. Whether a state court judgment, based upon a legal principle declared subsequently by the Supreme Court of the United States to be erroneous and preempted by federal law, is deserving of full faith and credit in the courts of the United States.

INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING CERTIORARI 7
LIST OF PARTIES 2

INDEX TO APPENDICES

APPENDIX 1. Opinion of the United States Court of Appeals for the Fifth Circuit 1-1
APPENDIX 2. Judgment 2-1
APPENDIX 3. Order Denying Rehearing 3-1
APPENDIX 4. Judgment of the U.S. District Court, Middle District of Louisiana 4-1
APPENDIX 5. Opinion of the United States Court of Appeals for the Fifth Circuit in the case of Erspan vs. Badgett, 659 Federal Reporter 2nd 26 5-1

TABLE OF AUTHORITIES CITED

McCarty vs. McCarty, 101 S. Ct. 2728, 69 L. Ed. 2nd 589, June 26, 1981 .....4, 6, 7
American Mannex Corp. vs. Rozands, 462 F. 2nd 688, (1972), Cert. denied 92 S. Ct. 524 .....5, 6, 7
Garner vs. Giarrusso, 571 F. 2d 1330, (1978) 5, 6, 7
Red Fox vs. Red Fox, 544 F. 2d 301, (1977) 5, 6, 7
Erspan vs. Badgett, 659 F. 2d 26, (1981) 3, 5, 6
Hisquierdo vs. Hisquierdo, 439 U.S. 572, (1979) 7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1981

ANDREW FRANKLIN WILSON

Petitioner

Vs.

BARBARA S. WILSON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, Andrew Franklin Wilson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on February 12, 1982.

OPINION BELOW

The Opinion of the United States Court of Appeal for the Fifth Circuit, filed February 12, 1982, is not yet reported and is printed as Appendix 1 to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1982. A petition for rehearing was filed February 26, 1982, and was denied on March 15, 1982. The Court then granted a stay of mandate until April 25, 1982. This petition for writ of certiorari is filed within ninety (90) days of the date of entry of the order denying rehearing as provided in 28 U.S.C. 2101(c). This Court's jurisdiction is invoked under 28 United States Code, Section 1254(1).

LIST OF PARTIES

The caption of the case contains the names of all parties hereto.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that the doctrine of "Res judicata" applies to this case.

2. Whether the doctrine of "Res Judicata" should be overridden in this instance to avoid a manifest injustice and because of overriding public policy.

3. Whether the United States Courts are invariably bound to the principle of "Res judicata" despite contravening public policy.

4. Whether a state court judgment, based upon a legal principle declared subsequently by the Supreme Court of the United States to be erroneous and preempted by federal law, is deserving of full faith and credit in the courts of the United States.

STATEMENT OF THE CASE

In July, 1970, the 98th District Court of Travis County, Texas, signed a final judgment in a divorce suit between plaintiff and defendant herein decreeing that certain military retirement benefits to be received by defendant in the future were "community property", and ordering that when they were paid, defendant pay from them to plaintiff the sum of $226.25 per month for the rest of his or her life. When the retirement pay began, in 1971, defendant failed to pay, and eventually, plaintiff filed the present action in the U.S. District Court to enforce the judgment of the Texas Court and to collect arrearages. The case was tried and the District Court held for the plaintiff, with written findings of fact and conclusions of law. Defendant appealed, and since the appeal was filed, the U.S. Supreme Court has rendered a decision holding generally that federal law precludes a state court from dividing military retired pay pursuant to the states community property laws. The Court of Appeals, Fifth Circuit, affirmed the judgment of the District Court, holding that Res judicata required that the Texas judgment be given full faith and credit, citing the earlier decision of *Erspan vs. Badgett*, 659 Federal Reporter 2nd 26, as being conclusive.

SUMMARY OF THE ARGUMENT

1. The State Court judgment was based upon a legal theory now held by the U.S. Supreme Court to be erroneous, preempted by federal law, and in violation of public policy set by the Congress.

2. Overriding public policy justifies the refusal of the Courts of the United States to be bound by the principle of "Res Judicata" in this case.

3. Such a refusal has been recognized in prior decisions of the Courts of Appeal, said decisions being affirmed by the Supreme Court by way of denial of certiorari.

ARGUMENT

The primary authority for petitioner's position in this case is the very recent case of *McCarty vs. McCarty*, Supreme Court of the United States, 101 S. Ct. 2728, 69 L. Ed. 2nd 589, decided June 26, 1981. In *McCarty* the issue of whether military retirement pay was subject to state community property laws was squarely faced and decided in the **negative!** The Court held:

> "We conclude, therefore, that there is a conflict between the terms of the federal retirement Statutes and the community property right asserted by appellee here. . . . . it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests."

We submit that the law of this point is now clearly and finally decided. The judgment of the Texas Court upon which this suit is based could not now be validly signed. The remaining question is whether or not the doctrine of Res Judicata requires that said judgment still be given full faith and credit!

We contend that it should not. Two cases from the Court of Appeals, Fifth Circuit and one from the 9th Circuit, all recognize that overriding federal policy justifies a departure from strict application of Res Judicata.

1.

The opinion of the Court of Appeals herein, dated February 12, 1982, does not consider nor follow two prior decisions of that Court and one from the 9th Circuit in that the general rule of law set forth in those opinions is directly applicable to the instant case and, if followed, would lead to the opposite conclusion from that arrived at by the Court in the aforesaid opinion.

In the case of *American Mannex Corp. vs. Rozands*, 462 F. 2d 688 (1972) certiorari denied 93 Sup. Ct. 524, the 5th Circuit held that federal courts are "not invariably bound" to Res Judicata and full faith and credit principles and that "other well defined federal policies" may compete and preclude both Res Judicata and the granting of full faith and credit. The Supreme Court affirmed this doctrine with a simple "Writ denied."

Six years later, in the case of *Garner vs. Giarrusso*, 571 F. 2d 1330 (1978) the 5th Circuit held that neither Res Judicata nor collateral estoppel should be "rigidly applied" and that both doctrines must be qualified or rejected "when their use would contravene an overriding public policy or result in a manifest injustice."

In 1977, in the case of *Red Fox vs. Red Fox*, 564 F. 2d 301, the 9th Circuit held (Page 365), as follows:

> "Although our duty to recognize state judgments is founded on 28 USC sec 1738; which required federal courts to give the same "full faith and credit" that the judgmetns would be given in the jurisdiction of their rendition, it is recognized that the implimentation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of that rule."

We submit that these three (3) cases are directly in point on the issues presented herein. Further, the theories upon which these three (3) cases are based were never offered nor argued in the case of *Erspan vs. Badgett*, 659 FED REPORTER 2d 26, (1981), the precedent authority upon which the Court bases its opinion herein of February 12, 1982. In *Erspan*, the Court clearly states, (p-28)

"Defendant advances no reason why that judgment

> should be denied its usual res judicata effect, and none is readily apparent: . . ."

We further submit to the Court that had the doctrines of the three (3) above cited authorities, affirmed and approved by the Supreme Court, by denial of writ in *American Mannex Corp.*, been fully considered in *Erspan*, the Court should have come to a different conclusion therein as it should now in the instant case. Since these doctrines and precedents were not considered in *Erspan*, we submit that *Erspan* is clearly distinguishable from the instant case.

The key words of the three (3) authorities relied upon by petitioner are:

> "Other well defined federal policies" (*American Mannex Corp.*)
>
> "Contravene an overriding public policy" (Garner)
>
> "Countervailing and compelling federal Policies" (Red Fox)

the Court should now grant the writ requested herein and address itself to the question, not considered in the opinion of the Fifth Circuit of February 12, 1981, of whether or not the public policy forcefully set forth in *McCarty vs. McCarty*, —— U.S. —— 101 Sup. Ct. 2728, 69 L. Ed. 2d 589, (1981) is sufficient to meet the tests set forth in the above cited cases. The public policy declaration in *McCarty* could hardly have been stated more strongly:

> "We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appelle here. . . . it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests." (emphasis supplied)

How could the Supreme Court more clearly say it? "Clear and substantial federal interests" certainly appears to be the equivalent or even stronger than the criteria cited above in the two (2) prior cases from the Fifth Circuit and the one from the 9th Circuit. It would appear difficult to find a more justified appilcation of the doctrines of *American Mannex Corp., Garner* and *Red Fox* than in this case, under the Supreme Court's statement of policy in *McCarty.*

We suggest to the Court that a manifest injustice will be done to petitioner if the present judgment herein stands. Granted that he did not appeal the Texas judgment, but how could he have had any remote hope for success? The matter was well established in Texas law and the precedent of the case of *Hisquierdo vs. Hisquierdo,* 439 U.S. 572, 1979, had not yet been decided. The McCarty case, op cit, changed the entire question, and petitioner now must face the fact that had his case come before the Texas court **after** McCarty, the result would have been totally in his favor as to his retirement pay. To now hold him to the Texas Courts' judgment is somewhat like telling a slave in 1870 that "Res judicata" barred him from freedom despite the Thirteenth Amendment! The basic rationale of the authorities cited above clearly cover this situation to prevent the manifest injustice the standing decision imposes upon petitioner. "Res judicata" is not an absolute, immutable doctrine, nor should it be. Times change, overriding public policy changes and decisions contra thereto should be refused full faith and credit as were those on the issue of slavery.

CONCLUSION

We submit that the criterion established by the authorities cited above thoroughly justifies a refusal of the federal courts to consider the judgment of the Texas Court in this case a matter of Res Judicata or to grant it full faith and

credit in the face of an overriding public policy. Therefore, a writ of certiorari should issue herein and the judgments of the District Court and the Fifth Circuit in this case should be reversed, plaintiff's complaint dismissed, at her cost, and defendant's supersedeas bond discharged.

Respectfully Submitted;

Jack N. Rogers
604 St. Ferdinand Street
Baton Rouge, LA 70802
(504) 344-4369

CERTIFICATE

I certify that a copy of the foregoing petition for writ of certiorari was served upon opposing counsel Daniel L. Avant, P. O. Box 3778, Baton Rouge, LA 70821, by mailing same postpaid to him this _____ day of April, 1982.

Jack N. Rogers
Attorney for Andrew Franklin Wilson

Appendix

APPENDIX 1

Barbara S. WILSON, Plaintiff-Appellee,

v.

Andrew Franklin WILSON,

No. 80-3845
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 12, 1982.

The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, entered judgment ordering former husband to pay former wife arrearages due under Texas divorce decree, and the former husband appealed. The Court of Appeals held that final, unappealed Texas divorce judgment apportioning military retirement pension was entitled to res judicata effect, despite subsequent entry by United States Supreme Court of decision holding that military retirement benefits are not divisible in state court decrees as community property.

Affirmed.

Judgment 823(3.16)

Final, unappealed state court divorce judgment apportioning military retirement pension was entitled to res judicata effect, despite subsequent entry by United States Supreme Court of decision holding that military retirement benefits are not divisible in state court decrees as community property. U.S.C.A.Const.Art. 4, § 1; 28 U.S.C.A. § 1738.

Appeal from the United States District Court for the Middle District of Louisiana.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

This case presents for decision the question whether a 1970 Texas divorce decree awarding appellee a portion of her husband's military retirement payments survives the recent Supreme Court decision in *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). On the basis of this Court's opinion in *Erspan v. Badgett*, 647 F.2d 550 (5th Cir. 1981), *reh. en banc denied with opinion*, 659 F.2d 26 (5th Cir. 1981), we are obligated to affirm the trial court's decision that the prior judgment was res judicata as to Andrew Wilson.

Facts

Barbara Wilson brought this diversity suit in the United States District Court for the Middle District of Louisiana to enforce a 1970 decree of the 98th Judicial District Court of Travis County, Texas, which awarded her $226.25 per month from her husband's military retirement pay. Andrew Wilson, although represented by counsel at the prior hearing, never appealed that decision. His retirement payments became due in 1971, but Barbara never received any money.

Barbara urged that the federal court, sitting in diversity, has the same obligation as a Louisiana state court to give full faith and credit to the Texas state court decree. After a bench trial, the District Judge agreed and ordered Andrew to pay Barbara $24,435 in arrearages for the period from September 1971 to August 1980 and future payments of $226.25 per month beginning September 1980. Andrew appealed.

Discussion

Federal law, 28 U.S.C. § 1738,[1] requires that state judgments be given "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken." *See Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (res judicata applies in 42 U.S.C. § 1983 actions); *Gresham Park Community Organization v. Howell*, 652 F.2d 1227, 1241 n.42 (5th Cir. 1981) (Georgia court injunction). Thus if Texas courts would enforce the decree, the District Court must do so as well.

Under the principles of res judicata, a final judgment on the merits in an action precludes the parties from relitigating issues that were or could have been raised in that action. The Texas state court decision, which Andrew never appealed, constituted such a final judgment. Since Andrew could have appealed or raised the points he now makes in that proceeding, res judicata acts as a bar in this suit.

Andrew does not challenge the 1970 decision but argues that *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69

---

1. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

L.Ed.2d 589 (1981), which squarely held that military retirement benefits are not divisible in state court decrees as community property, negates the application of res judicata. Whatever the merits of that claim, it is foreclosed by this Court's decision (Erspan II) rehearing en banc denied, *Erspan v. Badgett*, 659 F.2d 26 (5th Cir. 1981).[2] *Erspan II* holds that where a court has entered a final divorce decree apportioning military retirement benefits among husband and wife, *McCarty* does not overcome the res judicata effect of the prior decision. The Court relied on *Federated Department Stores, Inc. v. Moitie*, —— U.S. ——, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103, 108 (1981), where the Supreme Court stated, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." Reasoning that the Supreme Court in *McCarty* would have explicitly so stated if it "intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments," 659 F.2d at 28, the Court declined to do so on its own in the absence of a Texas state court decision granting *McCarty* preclusive effect even as to final decisions.

As we are absolutely bound by *Erspan II*, we likewise defer to an obvious if unexpressed implication of that decision. Although henceforth Texas divorce courts, aware that they cannot divide military retirement benefits as community property, can fashion an equitable distribution of other com-

---

2. Two recent Texas state court opinions, **Powell v. Powell**, 620 S.W.2d 252 (Tex.Civ.App.—Waco, 1981), and **Jeffrey v. Kendrick**, 621 S.W.2d 207 (Tex.Civ.App.—Amarillo, 1981), deal with the application of **McCarty** to direct appeals in divorce proceedings. In both cases, no final decree had been entered prior to the announcement of the **McCarty** decision. Thus res judicata did not come into play. Those cases obviously provide no guidance in the current circumstances. In the absence of a definite holding by a Texas court on **McCarty's** effect on the principle of res judicata, **Erspan II** governs.

munity property so as to strike a rough balance, denial of res judicata effect where the property division is final would result in a windfall for the retired spouse.[3] In the good company of the late and much missed Judge Ainsworth of this Court,[4] we believe that *Erspan II* necessarily applies equally to future payments where, as here, a court some years before has entered a final judgment dividing marital property. The Travis County court's final, unappealed decision does not lose its binding effect as to the future payments by Andrew to Barbara.

AFFIRMED.

---

3. **Erspan I** merely held that Mr. Badgett's discharge in bankruptcy did not affect the state court divorce decree and property settlement. Accordingly, this Court affirmed the trial court's holding that Mary Erspan was entitled to arrearages and to the future allotment of her share of Badgett's military retirement benefits. Between the date of that decision and the Court's opinion denying rehearing en banc, the Supreme Court intervened, announcing the **McCarty** decision. In **Erspan II**, the Court through Judge Johnson discussed in detail the **McCarty** holding and its possible effects on state court divorce decrees. The Court observed that application of **McCarty** to prior, final divorce decrees would upset settled property divisions and cause unfairness to persons like Mary Erspan—or Barbara Wilson. "By denying prior state court decrees the effect of equitably distributing the marital property between the former spouses, [any such approach] would achieve prospective uniformity at the expense of individuals whose rights were determined in reliance upon a prior interpretation of the applicable law." 659 F.2d at 28, n.2. Postulating an even division of military retirement pay and all other property between the spouses, the Court pointed out that retroactive application of **McCarty** would leave non-military spouse with only the 50% of the other property. Assuming for these purposes that the present value of the military retirement pay was equal to the value of the remaining community property, the non-retired spouse would end up with only 25% of the total property and no way in which to correct that unfairness. Seeking to avoid such inequitable treatment, the Court refused to allow **McCarty** to overcome the res judicata effect of the state court decision.

4. Judge Ainsworth, dissenting in **Erspan II**, expressed the belief that non-retired spouses were entitled to receive only the benefits payable before June 26, 1981, the date of the **McCarty** decision. Although with his death on December 22, 1981, we cannot know of his decision it seems obvious that he read **Erspan II**, as do we, as establishing the non-retired spouse's right to future payments as well.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3845
Summary Calendar

D. C. Docket No. CA-77-450-A

BARBARA S. WILSON,
Plaintiff-Appellee,

versus

ANDREW FRANKLIN WILSON,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

FEBRUARY 12, 1982

Issued as Mandate:

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3845

BARBARA W. WILSON,
Plaintiff-Appellee,

versus

ANDREW FRANKLIN WILSON,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

---

ON PETITION FOR REHEARING
(March 15, 1982)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BARBARA S. WILSON

VERSUS **CIVIL ACTION NO. 77-450-A**

ANDREW FRANKLIN WILSON

JUDGMENT

This matter came on for trial without jury on February 28, 1980. After hearing the evidence and arguments of counsel, the court for written reasons assigned on July 25, 1980,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of plaintiff, Barbara S. Wilson, and against defendant, Andrew Franklin Wilson, recognizing and making executory the August 31, 1970 judgment of the 98th istrict Court of Travis County, Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of plaintiff, Barbara S. Wilson, and against defendant, Andrew Franklin Wilson, accumulating the past due sums owed under the August 31, 1970 judgment of the 98th District Court of Travis County, Texas, in the amount of Twenty Four Thousand Four Hundred Thirty-Five and 00/100 ($24-435.00) Dollars, from September 1, 1971 through August 1, 1980, and making same executory.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Andrew Franklin Wilson, pay to Barbara S. Wilson the sum of $226.25 per month commencing

September 1, 1980, and continuing so long as he receives military retirement pay.

JUDGMENT RENDERED, READ AND SIGNED at Baton Rouge, Louisiana, this 6th day of August, 1980.

/s/John V. Parker
Judge, United States District Court

APPENDIX 5

Mary Frances ERSPAN, Plaintiff-Appellee Cross-Appellant,

v.

Lloyd J. BADGETT, Defendant-Appellant Cross-Appellee.

No. 79-4011.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Oct. 9, 1981.

Former wife brought action to enforce terms of 1963 divorce decree. The United States District Court for the Western District of Texas, William S. Sessions, Chief Judge, entered judgment, and appeal was taken. The Court of Appeals, 647 F.2d 550, affirmed. On suggestion for rehearing en banc, the Court of Appeals held that: (1) the Court of Appeals lacked jurisdiction to "reverse" the decree so as to invalidate award to former wife of interest in former husband's military retirement benefits, and (2) the decree settled not only issues actually litigated but also issues that could have been litigated, and thus the decree was entitled to res judicata effect as to former husband's claim that award to former wife of interest in his military retirement benefits should be "reversed" on basis of intervening United States Supreme Court precedent.

Denied.

Ainsworth, Circuit Judge, dissented and filed opinion.

---

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

1. Federal Courts 932

The Court of Appeals lacked jurisdiction, on appeal from judgment entered in former wife's action to enforce terms in former wife's action to enforce terms of 1963 divorce decree, to "reverse" the decree so as to invalidate award to former wife of interest in former husband's military retirement benefits. 37 U.S.C.A. § 701(a, d).

2. Judgment 828(3.39, 3.42)

A 1963 divorce decree settled not only issues actually litigated but also issues that could have been litigated in such proceeding, and thus the decree was entitled to res judicata effect as to former husband's claim, made in former wife's action to enforce terms of the decree, that award to former wife of interest in his military retirement benefits should be "reversed" on basis of intervening United States Supreme Court precedent. 37 U.S.C.A. § 107(a, w).

Stephen F. Hefner, Sherman, Tex., for defendant-appellant cross-appellee.

Colbert N. Coldwell, El Paso, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Western District of Texas.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 10, 1981, 5th Cir., 1981, 647 F.2d 550.)

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER**, District Judge.

** District Judge in the Western District of Louisiana, sitting by designation.

PER CURIAM:

Following the issuance of the panel opinion in this case, defendant Badgett filed a Suggestion for Rehearing En Banc, in which he now argues, *inter alia*, that under the authority of the Supreme Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), in which the Court held that Railroad Retirement Act benefits are not divisible as community property in state court divorce decrees, federal law likewise should be held to preclude state courts from dividing military retirement benefits in divorce proceedings pursuant to state community property laws. In his Suggestion, defendant also notes that the Supreme Court agreed to decide this precise question in *McCarty v. McCarty*, *argued* 49 U.S.L.W. 3661 (March 2, 1981). Defendant asserts that "[t]o the extent that the divorce decree conflicts with the decision of the Supreme Court of the United States in *Hisquierdo*, . . . it should be reversed."

[1, 2] Two days after defendant filed his Suggestion in the case *sub judice*, the Supreme Court announced its opinion in *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d — (1981), in which the Court held that military retirement benefits, like railroad retirement benefits, are not divisible in state court decrees as community property, and accordingly reversed the judgment of the California Court of Appeal, which had affirmed the award.[1] Unlike both *McCarty* and *Hisquierdo*, however, which were direct appeals from state court divorce decrees, the case *sub judice* is not: there is no divorce decree before this Court. Moreover, notwithstanding defendant's invitation for this Court to "reverse" the February 21, 1963 judgment of the 65th Judicial District Court of El Paso County, Texas, we have no such jurisdiction. Defendant advances no reason why that judgment should be denied its usual *res judicata* effect, and none is readily

1. Badgett subsequently filed a memorandum with this Court in which he expressly relies upon the Supreme Court's decision in McCarty.

apparent: as a final judgment, it settles not only the issues actually litigated, but also any issues that *could* have been litigated in that proceeding. *Federated Department Stores, Inc. v. Moitie*, —— U.S. ——, 101 S.Ct. 2424, 2427, 69 E.Ed. 2d 103 (1981). Furthermore, as the Supreme Court noted in *Federated Department Stores*, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." —— U.S. ——, 101 S.Ct. 2427 (citations omitted). Nothing in *McCarty* suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments. Absent some indication of such an intent, we decline to do so.[2]

---

2. In any event, defendant did not raise this issue in his brief. Indeed, in his original brief defendant argues that military retirement benefits **are** divisible as community property. Appellant's brief at 6, 16. We also note in passing that the 1963 divorce decree which defendant now attacks merely incorporated a property division **agreed to** by the parties.

As the dissent correctly notes, this Court has held that a change in the law occurring between the first and second suits may negate the res judicata effect of a case adjudicating constitutional rights. **See Jackson v. DeSoto Parish School Board**, 585 F.2d 729 (5th Cir. 1978). The reason for this rule is simple: "Faced with changing law, courts hearing questions of constitutional right cannot be limited by res judicata. If they were, the constitution would be applied differently in different locations." **Id.**, quoting **Parnell v. Rapides Parish School Board**, 563 F.2d 180, 185 (5th Cir. 1977). Relying upon this principle, the dissent asserts that "[a] subsequent change in the law should also negate the res judicata effect of a decision where, and to the extent that, (1) the rights adjudicated in that decision do not accrue until after the intervening change in the law has occurred, and (2) the operation of res judicata would result in unequal treatment of similarly situated individuals." (footnote omitted).

Assuming that plaintiff's right to defendant's retirement benefits, although established in the 1963 decree, "accrues" only when each periodic payment is actually due and payable, the dissent's reasoning overlooks the fact that plaintiff simply is not "similarly situated" to individuals whose divorce decrees are rendered after **McCarty**. As noted in the panel opinion of this case, Texas courts are authorized to divide marital property in a "just and right" manner. In making this determination, Texas courts consider several factors, including an ex-spouse's future need for support. 647 F.2d at 554. Whereas pre-**McCarty** divorce courts have considered a spouse's military retirement benefits as community property when divid-

ing the other joint property of the spouses in a "just and right" manner, a post-**McCarty** court will not. Under the dissent's proposed approach, the overall equitable distribution of marital property fashioned by Texas courts in cases decided before **McCarty** would be frustrated, if not destroyed.

For example, assume a $100,000 total community estate, in which a pre-**McCarty** court determined that a "just and right" division called for an award of $50,000 each to the husband and wife. Further assume that the pre-**McCarty** court accomplished this award by equally dividing the husband's military retirement benefits, which had a present value of $50,000, and also by equally dividing the remaining community estate, which likewise had a value of $50,000. Under the pre-**McCarty** decree, each spouse shared equally, $50,000 each, in the court's division.

Under the dissent's proposed approach, however, this division would now be altered dramatically. Whereas the former wife's claim to one-half of the military retirement benefits would, to the extent payable after the effective date of **McCarty**, be unenforceable, the former husband would now possess **all** of the military retirement benefits payable after that date **plus** one-half of the remaining community estate. Consequently, the former husband would now possess approximately **seventy-five** percent of the total community estate, **i. e.**, $75,000 (less one-half of any retirement benefits payable before the effective date of **McCarty**). Th former wife would now possess only twenty-five percent of the community estate, **i. e.**, $25,000 (plus one-half of any retirement benefits payable before the effective date of **McCarty**). Under the dissent's proposed disposition, to a greater or lesser degree, every "just and right" division would be similarly affected.

The dissent's proposed approach, which would enforce divisions of military retirement benefits only to the extent that the benefits were payable before the effective date of **McCarty**, would not place all individuals on an equal footing for yet another reason. Whereas under a divorce decree entered long before **McCarty** the military retirement benefits received by a former wife might be substantial, the benefits which a former wife would receive under a decree entered only a few months prior to **McCarty** would be insignificant, because the former wife would be entitled to share only those benefits actually payable before **McCarty**. Indeed, the length of time between the divorce decree and **McCarty** would become precisely the type of "fortuitous circumstance," **infra** Slip op. at 12079, at ——, that the dissent finds objectionable.

Of course, a post-**McCarty** court will be aware that military retirement benefits henceforth cannot be divided. Presumably, such a court, finding that a $50,000 award to the former wife is essential to a "just and right" division, will allocate a larger share of the divisible community estate to the former wife. The point, however, is that future courts will be able to make such an adjustment, if appropriate. Pre-**McCarty** decrees already are cast.

Rather than place all individuals on an equal footing, the dissent's approach would achieve just the opposite: By denying prior state court decrees the effect of equitably distributing the marital property between the former spouses, the dissent would achieve prospective uniformity at the expense of individuals whose rights were determined in reliance upon a prior interpretation of the applicable law.

Similarly, defendant's argument that 37 U.S.C. § 701(a)[3] evinces a congressional intent that military retirement benefits be exempt from division on divorce as community property is of no avail. For the reasons stated *supra*, this issue is not properly before this Court. Finally, we note that although it might be argued that, after *McCarty*, section 107(a) should be read to prevent "anticipation" of an officer's pay account by assignment, *compare* —— U.S. at ——, 101 S.Ct. at 2739 n.22 *with id.* at ——, 101 S.Ct. at 2746 (Rehnquist J., dissenting), the district court's order requiring defendant to file an allotment order with the Army providing for the payment directly to plaintiff of her share of defendant's retirement benefits was based not upon section 701(a), but rather upon section 701(d),[4] which specifically authorizes the Secretary to allow a member of the Army or the Air Force to make such allotments "for the support of his relatives, or for any other purpose that the Secretary concerned considers proper." *Id.* As noted in the panel opinion in the present case, the Office of the Judge Advocate General, Department of the Army, informed counsel by letter that the Department of Defense Military Pay and Allowances Entitlements Manual was amended on December 19, 1977 to permit retired members of the military to authorize allotments to former spouses. Absent any argument that the Secretary exceeded his authority in authorizing such allotments, or that the district court's

---

3. Section 701(a) provides:

Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

4. Section 701(d) provides in part:

The Secretary of the Army or the Secretary of the Air Force, as the case may be, may allow a—

(1) member of the Army or the Air Force to make allotments from his pay for the support of his relatives, or for any other purpose that the Secretary concerned considers proper.

order requiring defendant to execute such an allotment was otherwise improper,[5] we decline to set that order aside.

No member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1980), the Suggestion for Rehearing En Banc is

DENIED.

AINSWORTH, Circuit Judge, dissenting:

This case presents the important question of whether the Supreme Court's recent decision in *McCarty v. McCarty*, —— U.S. ——, 101 S.Ct. 2728, 69 L.Ed.2d — (1981), applies where a state court's judgment dividing military retirement benefits pursuant to state community property laws antedates *McCarty*, but where the right to deceive some or all of the benefits so divided does not accrue until after the date of that decision. Because the court's decision today would result in unequal treatment of similarly situated individuals, I would reverse the district court's judgment in part, and hold that plaintiff is entitled to share only those military retirement benefits payable before June 26, 1981.

I joined in the original panel opinion affirming the districa court decision to enforce the terms of a 1963 divorce decree awarding plaintiff one-half of defendant's accumulated right under a United States Army retirement benefits program. *Erspan v. Badgett*, 647 F.2d 550 (5th Cir. 1981). Two weeks after that opinion was issued, the Supreme Court held in *McCarty* that federal law precludes a state court from

5. These issues have not been presented, and we do not decide them.

dividing military retired pay pursuant to state community property laws. This court now holds that the 1963 state court judgment granting plaintiff one-half of defendant's military retirement benefits enjoys res judicata effect,[1] even though the legal principle on which that judgment rested has been overruled.

The court correctly observes that, as a general rule, the res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment rested on a legal principle subsequently overruled in another case. *Federated Department Stores, Inc. v. Moitie*, —— U.S. ——, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). This rule is not, however, inflexible. In *Jackson v. DeSoto Parish School Board*, 585 F.2d 726 (5th Cir. 1978) the Fifth Circuit stated:

> It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. *See, eg.g., Commissioner of Internal Revenue v. Sunnen*, 1948, 333 U.S. 591, 599-602, 68 S.Ct. 715, 720-21, 92 L.Ed. 898, 906-08; *State Farm Mutual Automobile Insurance Co. v. Duel*, 1945, 324 U.S. 154, 162, 65 S.Ct. 573, 577, 89 L.Ed. 812, 819. In these cases, the operation of the preclusion doctrines would result in unequal treatment of similarly situated individuals, some of whom have the misfortune to have sought legal redress at an earlier phase of legal developments.

Id. at 729.

---

1. The federal courts must give to a judgment of the court of any state the same full faith and credit that the judgment has "by law or usage" in the court rendition. 28 U.S.C. § 1738 (1970). We are therefore compelled to give to the 1963 judgment of the district court of El Paso, Texas the same res judicata effect in this action as it would have been accorded by the Texas courts. **Clyde v. Hodge**, 413 F.2d 48, 50 (3d Cir. 1969). Where, as here, there is no Texas law on point, we must make an educated guess as to how the highest court of Texas would rule. **Nobs Chemical, U. S. A., Inc. v. Koppers Co.**, 616 F.2d 212 (5th Cir. 1980).

A subsequent change in the law has been held to negate the res judicata effect of a number of decisions adjudicating constitutional rights. *See, e.g., Jackson v. DeSoto Parish School Board, supra; Parnell v. Rapides Parish School Board,* 563 F.2d 180, 185 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978); *Christian v. Jemison,* 303 F.2d 52 (5th Cir.) *cert. denied,* 371 U.S. 920, 83 S.Ct. 287, 9 L.Ed.2d 229 (1962). A subsequent change in the law should also negate the res judicata effect of a decision where, and to the extent that, (1) the rights adjudicated in that decision do not accrue until after the intervening change in the law has occurred, and (2) the operation of res judicata would result in unequal treatment of similarly situated individuals.[2]

Both circumstances are present here. Many residents of community property states who will receive military retirement benefits after the date of *McCarty* have obtained or will obtain a judgment of divorce. Under the present ruling an essentially fortuitous circumstance — whether their judgment of divorce was entered before or after the date of *McCarty* — will determine whether those individuals may be compelled by state community property laws to pay, in the years following *McCarty,* part of their military retirement benefits to their former spouse. Because such unequal treatment is neither necessitated nor justified by the doctrine of res judicata, I am unable to join in the panel opinion herein.

---

2 The Supreme Court's decision in **Commissioner of Internal Revenue v. Sunnen,** 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948), although it involved collateral estoppel rather than res judicata, rested upon similar considerations. **Sunnen** held that an intervening change in the tax law resulting from a federal court decision precludes the applicability of collateral estoppel. The Court reasoned that if the prior determination were perpetuated as to the party involved in the proceeding, he would be accorded, in the years following the change in law, treatment different from that accorded other taxpayers of the same class. 333 U.S. at 599, 68 S.Ct. at 720.

END OF DOCKET